BILLY J. WILLIAMS, OSB #901366
United States Attorney
District of Oregon
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys
ethan.knight@usdoj.gov
geoffrey.barrow@usdoj.gov
craig.gabriel@usdoj.gov
1000 SW Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, et al.,	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR CHANGE OF VENUE (#713)**
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to defendants' Motion for Change of Venue: Presumptive Prejudice (ECF No. 713) and the supporting Memorandum (ECF No. 715), filed by defendant Patrick on behalf of all defendants.

Defendants seek a change of venue on the basis that that the "nature, content and amount of pretrial publicity" is presumptively prejudicial thus depriving defendants of a fair trial.

Defendants have not established that the pretrial publicity in this case has created a presumption that the jury pool is prejudiced against defendants. Defendants' Motion should be denied.

I. Defendants Have Not Demonstrated the Existence of "Presumptive Prejudice" Against Them That Would Require This Court to Order a Change in Venue

a. Fed. R. Crim. P. 21 and the *Skilling* Factors

Rule 21(a) provides that a change of venue is appropriate if "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." Fed. R. Crim. P. 21(a). To justify transfer based upon pretrial publicity, defendants must demonstrate that the pretrial publicity has undermined the judicial process, thereby denying their constitutional right to a fair trial. *See Rideau v. Louisiana*, 373 U.S. 723 (1963) and *Skilling v. United States*, 130 S. Ct. 2896 (2010). "Our decisions have rightly set a high bar for allegations of juror prejudice due to pretrial publicity." *Skilling*, 130 S. Ct. at 2925 n.34.

To determine whether a change in venue is appropriate, the Supreme Court has created four "Skilling factors" to evaluate defendant's claim: (1) size and characteristics of the community; (2) nature of the publicity; (3) time between the media attention and the trial; and (4) whether the jury's decision indicated bias. The Court in *Skilling* noted the large size of the community (Houston), that the publicity did not contain a confession or blatantly prejudicial information, the four-year lapse between the crime and trial, and his acquittal on some of the counts. There was no presumption of prejudice, and the full record of the jury selection procedures were adequate to provide Skilling with a fair trial.

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Prior to *Skilling*, the Ninth Circuit has repeatedly held, "[t]he presumed prejudice principle is rarely applicable, and is reserved for an 'extreme situation.'" *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988) (internal citations omitted) (affirming the denial of change of venue motion in capital murder trial of Robert Alton Harris, who brutally murdered two youths in San Diego). *See also United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996) ("Prejudice is rarely presumed because saturation defines conditions found only in extreme situations." (internal quotation marks and citation omitted)); *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993) ("Courts rarely find presumed prejudice because 'saturation' defines conditions found only in extreme situations." (internal citation omitted)).

Furthermore, the Ninth Circuit has set a high bar for when it grants a motion to change venue. *See, e.g.*, *United States v. Dischner*, 974 F.2d 1502, 1523 (9th Cir. 1992) (rejecting change of venue motion in corruption case despite 18,000 newspaper column inches, 70 opinion pieces and editorials, and 177 television news stories devoted to investigation), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997); *Gallego v. McDaniel*, 124 F.3d 1065, 1071 (9th Cir. 1997) ("[W]hile there was a considerable amount of media attention devoted to Gallego's trial, Gallego has failed to show that the media publicity in his case was so prejudicial and inflammatory as to have constituted legal saturation.").

b. The Pretrial Publicity in Defendants' Case Is Not Presumptively Prejudicial

Defendants claim that the nature of the publicity in his case gives rise to "presumptive prejudice" against them in the jury pool. (Defs.' Mem. 3). Defendants are correct that there was a significant amount of pretrial (and prearrest) publicity. (Defs.' Mem. 4). However, defendants' characterization of the publicity is inaccurate. They offer anecdotal evidence that

the extensive publicity cast defendants in an unfavorable light to such a degree that their sixth amendment right to a fair trial is in jeopardy. (Defs.' Mem. 4-5). Most of the arguably prejudicial publicity defendants rely upon are, in fact, comments made by members of the public that would not otherwise be viewed by the public or prospective jurors. Even drawing from defendants' anecdotal analysis of the news coverage surrounding the case, defendants offer little evidence to support the proposition that the coverage was overwhelmingly negative, rather than simply voluminous.

Defendants separately claim that many of the reports containing statements of the defendants have created the presumption of prejudice. (Defs.' Mem. 6). Defendants' arguments ignore the fact that they sought out the exposure and pretrial publicity they now claim is prejudicial. Indeed, defendants did not try to conceal their statements or activities from the press. To the contrary, defendants used the press as a vehicle to promote their own viewpoints and theory of the case, often engaging the press for the sole purpose of making self-serving statements.

Defendants also argue that the extensive media coverage of the crime "as it occurred" increases the presumption of prejudice. (Defs.' Mem. 3-4). To the contrary, and for the reasons stated above, much of the press coverage during the course of the occupation was initiated by defendants. There simply is no evidence based on the information provided by defendants to support the position that the jury pool is "presumptively prejudiced" against them and there is no evidence that "the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361.

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II. Conclusion

For the reasons stated above, defendants' Motion to Change Venue should be denied because they fail to fully demonstrate that the nature of the pretrial publicity is presumptively prejudicial.

Dated this 29th day of June 2016.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

s/ Ethan D. Knight
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys